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Robert B. Nichols and Ellen M. Nichols

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, 05 Cr. 1039 (CM)

Plaintiff,

- against -

SAMUEL ISRAEL III,

Defendant.

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ROBERT B. NICHOLS and
ELLEN M. NICHOLS,

Petitioners.

----- x

BAYOU MANAGEMENT LLC, 08 Civ. 6036 (CM)

Plaintiff,

- against -

ROBERT B. NICHOLS, ELLEN M.
NICHOLS, SAMUEL ISRAEL III, and JOHN
DOES 1-5,

Defendants.

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DECLARATION OF J. JOSEPH BANTON

J. JOSEPH BAINTON, pursuant to 28 U.S.C. § 1746, hereby declares:

1. I am a member of the firm of Smith, Gambrell & Russell, LLP, attorneys for Petitioners-Defendants Robert B. Nichols ("Mr. Nichols") and Ellen M. Nichols ("Mrs. Nichols") (together, the "Nichols").
2. I submit this declaration in opposition to the respective motions for sanctions under Federal Rules of Civil Procedure 37(b)(2)(A) of the United States of America (the "Government") and of Bayou Management, LLC ("Bayou") against the Nichols.
3. On November 28, 2008, the Government served its only set of document requests upon the Nichols. The Nichols's response to those requests are due on December 29, 2008. Copies of the Government's document requests to Mr. Nichols and Mrs. Nichols are respectively attached as Exhibits 3 and 4 to Declaration of Jeff Alberts, executed on December 8, 2008 ("Alberts Decl.").
4. On September 17, 2008, the Nichols timely served their responses to Bayou's document requests and have produced some 1,200 pages of responsive documents in these consolidated proceedings. The Nichols objected to Bayou's Request No. 6 seeking "[a]ll documents and things concerning or evidencing the payment or transfer of any or all of the \$10 million to a different bank account, third party, subsequent transferee, immediate transferee or mediate transferee" on various grounds, including "on the grounds that it is unduly burdensome, oppressive and not calculated to lead to the discovery of relevant evidence given their admission of receipt of the \$10 Million fee." Copies of the Nichols's responses are attached as Exhibit 5 to Alberts Decl., and as Exhibit 3 to Declaration of Jonathan Perry, executed on December 8, 2008 ("Perry Decl.").

5. On September 25, 2008, counsel for Bayou and I had a “good faith conference” addressing this objection. I explained that the request called for every check the Nichols had written over a four year period for such things as utility bills and dry cleaning.

6. Counsel for Bayou conceded that this might be unduly burdensome and asked that the Nichols provide a “big picture” description of their disbursal of the proceeds of the \$10 Million fee.

7. The Nichols provided additional information. To date, the Nichols have produced over 700 pages of responsive documents “tracking” the \$10 Million. No Rule 37(a) motion was made.

8. In light of several developments, the Nichols requested a conference with the Court for the purpose of discussing adjusting the Scheduling Order. Attached hereto as Exhibit A are true and correct copies of my letters to the Court regarding the Nichols’s request for a status conference.

9. The Nichols were particularly concerned due to the Government’s delay in producing documents that logically resulted the subsequent delay in scheduling of depositions as the parties agreed that the commencement of depositions should abide the completion of document production. (Ex. A.)

10. In recognition of the Court’s view on delays in bringing such matters to its attention, the Nichols promptly sought a status conference. (Ex. A.)

11. After several adjournments, a status conference was scheduled for November 14, 2008. (Ex. A.)

12. During the time leading up to the status conference, the parties continued their respective discovery efforts but neither Bayou nor the Government brought up the issue of the Nichols's production of documents.

13. At the conference on November 14, 2008, whose stated purpose was to consider the Nichols's request for an enlargement of time for discovery, counsel for Bayou and counsel for the Government – which had not served any document requests – complained about the completeness of the Nichols's responses.

14. The Court orally ordered the Nichols to produce documents "tracking" the \$10 Million payment within one week.

15. The Court also made clear that it would not grant any request for an adjustment of the discovery schedule. As such, the discovery deadline remains as December 31, 2008.

16. Documents sought by the Government and Bayou are equally available to them by issuance of subpoenas to banks where the Nichols maintain accounts.

17. The Nichols's petition arises out of the freezing of their funds in an account at HSBC Bank plc ("HSBC") in London, England, with the assistance of the United Kingdom at the formal request of the Government. (Alberts Decl., Ex. 1.)

18. The Government, therefore, is in a special position to obtain documents from HSBC as well as from Standard Chartered Bank in Singapore, where the Nichols's funds have also been frozen, albeit informally and also at the request of the Government.

19. The Government and Bayou, however, have not made any efforts to seek documents they claim to be so essential to these consolidated proceedings.

20. The Government has never formally claimed in this Court that the Nichols's two bank accounts are subject to forfeiture. The Government has never explained why it has not

asked this Court to enter either a preliminary or final order of forfeiture relating to the Nichols's two bank accounts.

21. The Nichols commenced their 853(n) proceeding in order to "clear the air" about their lack of involvement with the illegal activities of Israel at the suggestion of British law enforcement officials, who advised the Nichols not to attempt to enter their country until after they had cleared this matter up here.

22. The question is what happened to approximately \$7 Million of the \$10 Million because it is undisputed that the Government has caused the freezing of \$2 Million in the Nichols's Standard Chartered Bank account in Singapore and \$1 Million in the Nichols's HSBC account in London.

23. Mr. Nichols loaned a total of \$1,111,600 of the \$7 Million to two individuals: \$125,000 to Samuel Israel III ("Israel"), as to which Mr. Nichols has not been able to locate documentary proof; and £500,000 (\$986,600) to Frank Faryab. Attached hereto as Exhibit B is a true and correct copy of a letter from Mr. Faryab acknowledging the debt.

24. Mr. Nichols purchased a property in Arizona for \$1,545,000 and then spent \$1,080,000 improving it, thus making the total cash investment in the Arizona property \$2,625,000. Complete records as to the acquisition have been produced. Attached hereto as Exhibit C are true and correct copies of those documents.

25. Thus of the \$7 Million disbursed by the Nichols, approximately \$1.5 Million has not yet been completely documented. Of that balance, approximately \$1.4 Million has been disbursed to third-parties involved in obtaining and delivery of the "Box" to Israel. (Alberts Decl., Ex. 7 at 1, Ex. 8 at 2, Ex. 12 at 1-2; Perry Decl., Ex. 5 at 1, Ex. 6 at 2, Ex. 10 at 1-2.)

26. The Nichols resided in a London hotel suite from July 2004 through February 2005, and paid for that stay from the HSBC account.

27. The Nichols then rented a flat in London that costs approximately £53,000 per year. Attached hereto as Exhibit D are true and correct copies of documents, including the more recent leases.

28. In short, the Nichols spent on average \$350,000 per year between July 2004 and present, maintaining residences in Honolulu, Arizona and London, and traveling extensively and internationally pursuing business projects that did not ultimately prove profitable.

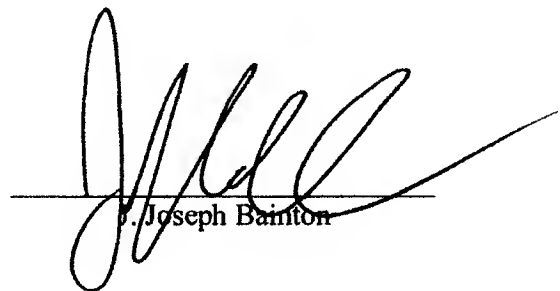
29. The Nichols have produced all of the documents in their possession, custody or control; have requested additional documents from third-parties such as their banks; and have never refused to sign any consent to enable either Bayou or the Government to deal with HSBC, which chooses not to deal with them.

30. My efforts and the Nichols's efforts to obtain records from HSBC have not been favored with the courtesy of a reply.

31. There are categories of transfer of funds that cannot be fully established by the documents produced by the Nichols, such as a \$125,000 loan made to Israel in or about July 2004, a \$50,000 donation made to a foundation founded by Mr. Nichols's father, repayment of a \$220,000 loan to a third-party, and repayment of a \$54,000 loan to Mrs. Nichols's father.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 23, 2008.



J. Joseph Bainton